REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 622 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE'S COURT AT MILIMANI LAW COURTS.....RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST INTERESTED PARTY

MOHAN GALOT.....2ND INTERESTED PARTY

RAJESH GALOT.....3RD INTERESTED PARTY

AND

PRAVIN GALOT.....EX-PARTE APPLICANT

JUDGMENT

Introduction

1. The factual chronology of the events which triggered these proceedings is essentially common cause or not disputed. *My reading of the respective parties' pleadings is that the history of this dispute is uncontroverted. It is common ground that the second Interested Party filed private prosecution case number 2 of 2017 before the second Respondent seeking leave to institute and conduct private prosecution against the applicant herein and the third Interested Party. He also sought an order that the court admits the charge as drawn by himself as per his complaint on oath.*

2. The substance of the complaint in the intended private prosecution was that the applicant and the third Interested Party conspired to defraud him and Galot Industries Limited. He also claimed that they forged company resolutions, minutes, letters and that they have continued to file parallel annual returns. He also alleged they obtained CR 12 on account of forged instruments. Additionally, he claimed that as a result of obtaining registration by false pretence and on account of forged CR 12, the applicant have continued without lawful authority to hold illegal meetings and pass special company resolution appointing company secretary without lawful authority of Galot Industries Limited. He also complained that the applicant and the third Interested Party had illegally appointed themselves as directors of the said company.

3. The second applicant was premised his application to commence private criminal prosecution on an alleged failure by the DPP to act on his complaints against the applicant and the second Interested Party.

4. The applicant herein filed a Notice of Preliminary Objection objecting to the said application citing two grounds, namely, that the application was made without leave of the court as ordered in HCCC No. 430 of 2012. He also stated that in view of the said order, the Magistrate's court lacked jurisdiction to entertain the application.

5. It is useful to state that in the said case, Galot Industries Limited was one of the plaintiffs while the applicant herein and the third Interested Party were Respondents. It is necessary to reproduce the said order below because it is at the centre of this application. The order

was couched in the following words:-

> **i. That** there shall be no alteration or variation of any record regarding any of the plaintiff companies pending the hearing scheduled for 20th July 2012.
>
> **ii. That** all title documents relating to any of the properties owned by any or all of the plaintiff companies shall be preserved as they are today. There shall be no dealing in any of them.
>
> **iii. That** the operations of the second plaintiff Manchester Outfitters limited should continue as usual. That includes procurement and signing of cheques to effect various transactions. The 1st and 2nd defendants shall continue to run the said company.
>
> **iv. That** there should be no filing of any other suit or application except with leave of the court.

6. On 8th October 2012, the above order was extended by consent pending hearing and determination of the case. From the material before me, it is not clear whether the said case has been heard and determined. The applicant's objection premised on the said order was dismissed on 4th November 2017 triggering the instant application.

7. In Mohan Galot v *Registrar of Companies Attorney General and Manchester Outfitters Limited, Pravin Galot & Rajesh Galot (Interested Parties)**[1]* (a case involving the parties herein and their companies), I observed that the parties in this case have numerous interrelated suits pending in court. In the said determination, I noted that for unexplained reasons, the suits have remained undetermined for years, a position I described as perplexing and unacceptable. The instant application has been pending in court since 2017. The common thread in all the interrelated suits is that they involve disputes between the directors and the shareholders of the companies. In the said case I noted that there existed 14 interrelated suits pending in the High Court involving substantially if not all the parties herein and the various companies. Also relevant to the instant case is the fact that the order the basis of the above stated Preliminary Objection was rendered in one of the 14 interrelated suits.

8. With the above background, I now turn to describe the parties to this suit.

The Parties

9. Pravin Galot, the applicant herein describes himself as a businessman and one of the Directors of Galot Industries Limited amongst other companies.

10. The Respondent, the Chief Magistrate's Court is a subordinate court established under Article 169 of the Constitution.

11. The first Interested Party is the Director of Public Prosecutions (herein after referred to as the DPP), established under Article **157** of the Constitution with constitutional mandate to *inter alia* institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.[2]

12. The second Interested Party, Mr. Mohan Galot is a male adult residing in Kiambu in the Republic of Kenya. He states that he is a Shareholder, Director and Chairman of the Board of Directors of Galot Industries, King Woolen Mills Limited, Galot Limited, Manchester Outfitters Limited among others.

13. The third Interested Party was the second Respondent in the application seeking leave to commence the private prosecution. He was enjoined in these proceedings pursuant to his application dated 17th October 2017.

Factual Matrix

14. It is uncontested that on 17th August 2017, the second Interested Party filed an application for leave to institute private prosecution against the applicant. The applicant herein filed a Preliminary Objection which was heard and ultimately dismissed on 4th October 2017. The crux of the objection was it offended the orders issued in HCC No 430 of 2012 referred to above. However, the Magistrate ruled that the Interested Party did not require leave since leave had been granted by Odunga J in Misc. Application Number 651 of 2016 which was not correct.

15. The applicant states that there is evidence from the Registrar of Companies showing that he is a director of Galot Industries Limited and that the charges against him relate to his activities in his capacity as a director backed by a valid High Court Order. He states that the commencement of the private prosecution has not been approved by the Board of Directors of Galot Industries Limited through a resolution, hence, the application is an abuse of court process. He also states that the second Interested Party filed the application for private prosecution knowing very well that there were other cases pending in court.

Legal foundation of the application

16. The applicant states that the Respondent and the second Interested Party have acted illegally, without justification and in contravention on High Court orders in HCCC No. 430 of 2012. He also states that the Respondent and the first Interested Party have failed to follow due process and their intention is to harass, intimidate and settle scores.

17. He states that by proceeding with the private prosecution, the Respondent will be aiding an illegal prosecution which is aimed at aiding the Interested Parties in civil suits pending before the High Court being HCCC No. 430 of 2012 and 55 of 2012, and, that, the issues raised

in the intended private prosecution are the same issues in dispute before the High Court. He also states that the prosecution is motivated by malice and it is an abuse of court process.

The prayers sought

18. The applicant seeks the following orders:-

> **a. That** *this court do issue an order of certiorari to move into this honourable court and quash all the proceedings and decisions made in the Nairobi Chief Magistrates Court at Milimani Law Courts in Private Prosecution Case number 2 of 2017.*
>
> **b. That** *this court do issue an order of prohibition restraining the Respondent and the second Interested Party from proceeding with the prosecution of the ex parte applicant in private prosecution case number 2 of 2017 at the Chief Magistrates Court at Milimani Law Courts pending the hearing and determination of the High Court Civil Case number 430 of 2012.*
>
> **c. That** *the costs of this application be provided for.*

Respondent's grounds of opposition

19. The Respondent filed grounds of opposition dated 1st October 2019 stating that the application is defective, has no merit and is based on misconception. It also states that there is no decision capable of being quashed hence it offends the provisions of order 53 Rule 7 of the Civil Procedure Rules, 2010. The Respondent also states that the application offends the provisions of section 9 (2) (3) of the Fair Administrative Action Act[3] on the exhaustion of alternative dispute resolution mechanisms and that it is filed in total disregard of the provisions of sections 372 and 193A of the Criminal Procedure Code[4] which provides for the revision or appeal and concurrent civil and criminal proceedings respectively. The Respondent also states that the application is an appeal disguised as a judicial review.

The first Interested Party's Response

20. The first Interested Party did not file any affidavit, but it filed submissions in support of the application.

The second Interested Party's Notice of Preliminary Objection

21. The second Interested Party filed a Notice of Preliminary Objection dated 31st October 2017 stating that the application is *res judicata* as it raises issues which had been the subject HC JR No. 651 of 2016 which was concluded in his favour, and, that, this court lacks jurisdiction to entertain the application and that it is an abuse of court process.

The second Interested Party's Replying Affidavit

22. The second Interested Party filed the Replying Affidavit dated 31st October 2017 in opposition to the application. He deposed that the applicant is not a director of Galot Industries Limited and that the Board of Directors of the said company can only be chaired by himself as provided by clause 5 (ii) (iii) and Article 10 of the company's Memorandum and Articles of Association. He deposed that as the governing director, pursuant to the powers conferred upon him by clause 5 of the Memorandum of Association and Article 10 of the Articles of Association, he appointed and removed the *ex parte* applicant from the Board of Directors of Galot Industries Limited on 1st March 1994 and 4th January 2001 respectively.

23. He also averred that his application for leave to institute private prosecution was necessitated by the filing of illegal parallel annual returns by the applicant and issuance of irregular CR 12 Certificates which were later used as exhibits in court and other government agencies. He deposed that the parallel annual returns where the CR 12 and, that, the company file got lost from Companies Registry.

24. Mr. Mohan Galot deposed that there is a court order issued in his favour in HCC No. 430 of 2012 in his favour to run Machester Outfitters Limited and restraining Mills Ltd and the applicant from interfering with the affairs of his companies, namely, Galot Industries Limited, Galot Limited, King Woollen Mills Limited, and Manchester Outfitters Limited. Additionally, he deposed that the court varied the said order to allow the applicant as managers and not as directors to run the affairs of Machester Outfitters Limited only pending the hearing and determination of the matter and not any other companies where they are also not directors, such as Galot Industries Limited, Galot Limited and Kin Woollen Mills Limited.

25. He deposed that whereas there existed an order in HCC No. 430 of 2012 that parties should not file any other suit, the order was specific to civil proceedings and not criminal complaints such as the case under challenge in these proceedings. He further deposed that the court in HC JR No. 651 of 2016 permitted him to re-commence the private prosecution *de novo* and that the said order has never been reversed and therefore it is wrong for the applicant to block a recourse already granted by the court. .

26. He also averred that the applicant's involvement in Galot Industries Limited and other companies was a forgery of CR 12 Certificates at the Companies Registry which necessitated his application for leave to institute private prosecution after the Office of the DPP refused and or ignored the complainant's complaints. Additionally, he deposed that the applicant is inviting this court to sit on appeal on an issue that has already been decided.

27. He averred that the office of the DPP failed to act independently despite several complaints, and that the DPP is partisan. He deposed that the learned Magistrate did not misinterpret the decision in JR No 451 of 2016.

The third Interested Party's further Affidavit

28. Rajesh Galot, the third Interested Party swore the further affidavit dated 13th February 2018 in support of the applicant's substantive application and in response to the second Interested Party's Replying Affidavit. He deposed that pursuant to the orders given in HCC No. 430 of 2012, the Registrar of Companies confirmed that the directorship of the company the subject of the proceedings in the private prosecution. He also deposed that subsequent searches issued by the Registrar of Companies on 16th March 2016 on the directorship of the companies confirmed that he is still the director of the two companies. He further averred that it is not in dispute that the orders issued in HCCC No. 430 of 2012 are still in force and that the directorship of Galot Industries Limited and King Woolen Mills is as captured in the annexed searches.

29. Mr. Rajesh Galot further averred that it is the second Interested Party who has breached the court orders issued in HCCC No. 430 of 2012 and that he severally made and attempted to use forged returns to gain directorship of the Galot Industries Limited and King Woolen Mills prompting him to complain to the police who charged the second Interested Party with 20 counts of forgery and fraud. Lastly, he averred that the second Interested Party could not institute and sustain the private proceedings without formerly seeking the leave of the court in HCC No. 430 of 2012.

The third Interested Party's Supplementary Affidavit

30. Mr. Rajesh Galot swore the supplementary Affidavit dated 2nd July 2018. He deposed that the second Interested Party has since been charged with several counts of forgery and uttering false documents in relation to the said companies being Criminal case number 276 of 2018. He deposed that the second Interested Party's intention of instituting private prosecution against him for the same offences he has been charged with is evidence that the proceedings are aimed at achieving an ulterior motive, hence, an abuse of court process. He also averred that the private criminal prosecution is aimed at pre-empting and frustrating the outcome of the investigations and the proceedings in Criminal case number 276 of 2018. Lastly, he averred that the private proceedings against him have been brought in bad faith.

The applicant's further Affidavit

31. The applicant, Mr. Pravin Galot swore the further dated 3rd October 2018. He averred that prior to the institution of these proceedings the second Interested Party was under police investigations for forging and uttering several documents relating to the subject companies. He averred that in February 2018, the second Interested Party was charged with several counts of forgery and uttering false documents in criminal case number 276 of 2018, hence, it is clear that the first Interested Party instituted the private prosecution in order to pre-empt the outcome of the investigations by the Directorate of Criminal Investigations. He averred that the private prosecution was undertaken with ulterior motives to circumvent and pre-empt the outcome of the investigations and charges in criminal case number 276 of 2018.

Second Interested Party's Supplementary Affidavit

32. The second Interested Party Mr. Mohan Galot swore the supplementary Affidavit dated 9th November 2018 in response to the applicant's further affidavit. He averred that the orders issued in HCC No. 430 of 2012 are in applicable in the instant case since the said order referred to civil cases only, and, it would be binding upon the parties to the case. He averred that he was not a party to the said case. He also averred that the applicant has not appealed against the ruling on his Preliminary Objection, and, that, the applicant in concert with the DPP instigated the criminal charges against him to scuttle the private prosecution against the applicant.

Applicant's advocates' submissions

33. Mr. Were, the applicant's counsel submitted that the first Respondent has no jurisdiction to entertain the private prosecution in light of the orders issued in HCC No. 430 of 2012. He relied on *Republic v Business Premises Rent Tribunal & Another ex parte Albert Kigera Karume*,[5] *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others*,[6]*Lalitmohan Mansukhal Bhatt v Prataprai Luxmichad and another*[7] and *Abu Chiaba Mohamed v Mohamed Bwana & 2 others*[8] among others for the holding that the doctrine of *stare decisis* dictates that lower courts adhere to the decisions of courts of superior hierarchy.

34. He also cited *Githunguri v Republic*[9] in support of the proposition that a prosecution is not to be made good by what it turns up, but, it is good or bad when it starts. Additionally, he relied on *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd*[10] and *Republic v Kenya Revenue Authority ex parte Yaya Towers Ltd*[11] which laid down the scope of judicial review jurisdiction. Additionally, he argued that a criminal prosecution commenced in absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose.[12] Further, he submitted that it is not the purpose of criminal investigation or a criminal charge to help individuals in the advancement of frustrations of their civil cases, otherwise it amounts to abuse of process. For this proposition, he relied on *Republic v Attorney General ex parte Kipngeno Arap Ngeny*.

35. Mr. Were argued that private prosecution numbers 1 of 2013 and 2 of 2017 are two distinct cases, hence, the defence of *res judicata* raised by the second Interested Party does not apply. He argued that the court in High Court Misc App No. 651 of 2016, did not dispense with the requirement for leave, hence, the court had no jurisdiction to entertain the case.

36. Mr. Were argued that the DPP properly exercised his discretion under Article 157 of the Constitution and section 6 of the *Office of the Director of Public Prosecutions Act*.[13] He relied on *Republic v DPP ex parte Welding Works and another*[14] for the holding that the office of the DPP is an independent constitutional office that is not subject to control, direction and influence by any other person. Additionally, he argued that it is for the DPP to decide whether the complaint discloses any criminal offence.[15]He submitted that upon considering the complaint, the DPP was persuaded that it did not disclose an offence. He relied on *Republic v Attorney General ex parte Arap Ngeny the prosecution*[16] which held that before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. He also cited *Otieno Clifford Richard v Republic*[17] which reiterated the principles for granting permission to conduct private prosecution as laid down in *Floriculture International Limited and*

Others.[18]

The first Interested Party's Advocates' submissions

37. Counsel for the DPP supported the application. She urged the court to grant the orders sought. She relied on *Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge and 9 others*[19] for the holding that the writ of prohibition issues where a tribunal or body acts without jurisdiction. She argued that the order issued in HCC No 430 of 2012 is binding on the Respondent and submitted that in the said case, the court ordered that there should be no filing of any other suit or application except court's leave.

The third Interested Party's Advocates' submissions

38. The third Interested Party also supported the application. His counsel submitted that the court in HCC No. 651 of 2016 did not dispense with the requirement of leave as ordered in HCC No. 430 of 2012. On the argument that the first Interested Party was not a party in HCCC No. 430 of 2012, he argued that he instituted the private prosecution as a director of Galot Industries, hence, he cannot hide behind the fact that he was not a party since the company was a party in HCC No. 430 of 2012. He argued that the private prosecution is aimed at pre-empting the criminal proceedings filed against the second Interested Party, hence it is aimed at achieving an ulterior motive.[20]

Respondent's Advocate's submissions

39. The Respondent opposed the application. Mr. Odhiambo, it's counsel argued that there is no decision presented to this court capable of being quashed, hence, the application offends the provisions of Order 53 rule 7 (1) of the Civil Procedure Rules, 2010.

40. He submitted that the law the law recognizes that private prosecution can be commenced within permissible frameworks, and, added that the order issued in HCC No. 430 of 2012 is not sufficient to bar criminal prosecution *vis a vis* the provisions of section 193A of the Criminal Procedure Code.[21]He argued that the decision to charge the Respondent was not influenced by the Respondent, and that there is no evidence that the charges were brought with ulterior motive nor is there impropriety on the part of the Respondent.

41. He argued that under the Constitution, the Magistrates Courts Act[22] and the Criminal Procedure Code[23]it is within the jurisdiction of the Respondent to determine the case. He submitted that the proceedings were commenced in accordance with the law, and that, there is no evidence of ulterior motive or bias on the part of the court. He cited *Republic v Inspector General of Police & 4 Others ex parte John Lopez Lutuka Kibwenge & Another*[24]for the proposition that a stay of prosecution will be allowed where it would be impossible to give the accused a fair trial or where it would amount to misuse/manipulation of process because it offends the courts sense of justice to try the accused in the circumstances of the case. He also argued that the applicant has not demonstrated the prosecution is brought in absence of factual basis.

42. Mr. Oddiambo relied on *Lawrence Maina v Director of Public Prosecutions & 2 Others*[25] in support of the holding that the court should be cautious not to usurp the constitutional mandate of the DPP to investigate and undertake prosecutions. He relied on *Republic v Attorney General & 4 others ex parte Kenneth Kariuki Githii*[26] for the holding that the mere fact that the intended criminal proceedings are likely to fail is not a ground for halting the proceedings. Mr. Odhiambo also relied on *Kuria & 3 others v Attorney General*[27] for the proposition that a prerogative order is an order of serious nature and cannot and should not be granted lightly, but it should only be granted where there is abuse of law. He submitted that the existence of HCC No 430 of 2012 is not a bar to the prosecution and added that section 193A of the Criminal Procedure Code[28] permits parallel civil and criminal proceedings and argued that the order was issued in respect of civil proceedings.

43. Lastly, Mr. Odhiambo relied on *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited*,[29]*Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another*,[30] *Municipaol Council of Mombasa v Republic & Umoja Consultants Ltd*[31] and *Pastoli v Kabale District Local Government Council & others*[32] all of which stated the grounds and scope of judicial review jurisdiction and argued that the applicant is not entitled to the reliefs sought.

Second Interested Party's Advocates' submissions

44. Counsel argued that the order issued in HCC No 430 of 2012 cannot be construed as a bar to criminal proceedings, and, that the leave granted by the lower court to commence the proceedings defeats the objection based on the high court orders. He argued that an order issued in civil proceedings cannot bind matters in criminal proceedings. Additionally, counsel relied on the ruling in HCC No. 615 of 2016 and argued that the court directed that the criminal proceedings could be instituted.

Determination

45. First, I will address Mr. Odhiambo's argument that there is no decision capable of being quashed as contemplated under Order 53 of the Civil Procedure Rules, 2010. In my view, such an argument can hold sway if we are to determine the issues raised in this case based on traditional common law Judicial Review principles. The argument ignores the fact that the Constitution of Kenya, 2010, fundamentally changed the legal landscape in this country.

46. Article **47** of the Constitution provides for the right to a fair Administrative Action. To give effect to Article **47**, Parliament enacted the Fair Administrative Action Act.[33] Section **2** of the act defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

47. Additionally, the right to access justice is guaranteed under Articles **48** of the Constitution, the right to enforcement of the Bill of Rights

is guaranteed under Article **22,** and the authority of the court to uphold and enforce the Bill of Rights is provided under Article **23**, of the Constitution. The question that arises is whether a citizen citing violation or threat of rights requires to annex a copy of the impugned decision as required by Order 53 of the Civil Procedure Rules, 2010.

48. Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others**[34]*** that *"the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."* The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

49. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. *First*, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights . *Second*, the right to access the court is now constitutionally guaranteed. This makes the requirement for the existence of a decision, order or proceedings should be read to include any administrative action as defined in section **2** of the Fair Administrative Action Act.[35]*Third*, under Article 22 of the Constitution, a person can approach the court citing a threat to violation of fundamental rights. This renders the existence of a written order, decision or judgment irrelevant. *Fourth*, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article **23(3) (f).** *Fifth,* section **7** of the Fair Administrative Action Act[36] provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section **7 (2)** of the act provides for grounds for applying for Judicial Review. The section does not state that an impugned decision must be in writing.

50. The Constitution is now the basis for Judicial Review. Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision.[37] Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.

51. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

52. It is therefore my conclusion that all that an applicant is required to do is to demonstrate that the impugned decision violates or threatens to violate the Bill of Rights or violation of the Constitution. No matter how noble and worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail.

53. It is my conclusion that the decision under challenge falls within the ambit of an administrative decision as defined in section **2** of the Fair Administrative Action Act,[38] a legislation that was enacted to give effect to Article **47** of the Constitution. To that extent, the application before me is well grounded on the law and proceedings under challenge are capable of being quashed should the court find and hold there are grounds to do so. It follows that Mr. Odhiambo's submission on the issue under consideration collapses.

54. Mr. Odhiambo and the first Interested Counsel argued that the applicant ought to have appealed or sought to review the ruling under challenge. Mr. Odhiambo also cited the doctrine of exhaustion provided in section 9 (2) of the Fair Administrative Action Act.[39]

55. It is critical to identify whether the decision of the learned Magistrate is an *'administrative action'* within the meaning of the definition at section 2 of the FAA Act, thereby rendering it amenable to Judicial Review under section 7 of the FAA Act or even under section 8 of the Law Reform Act[40] and Order 53 Rule 1 of the Civil Procedure Rules, 2010.

56. I have already reproduced above the definition of an *"administrative action"* under the Fair Administrative Action Act. The decisive question is therefore whether a court judgment, ruling or orders made by a court of competent jurisdiction such as the decision under challenge in this case can be classified as an administrative action or decision falling with the above definition capable of being reviewed.

57. The implication of the above definition is that the decision of a public authority or quasi-judicial tribunal is out rightly amenable to judicial review while the decision of any other person or body is amenable to judicial review if it affects the legal rights or interests of the concerned party. Judicial bodies are the ordinary courts of law - such as the Supreme Court, High Courts and the Magistrates Courts. A quasi-judicial body is a non-judicial body which can interpret law. It is an entity such as an arbitrator or tribunal board, generally of a public administrative agency, which has powers and procedures resembling those of a court of law or judge, and which is obliged to objectively determine facts and draw conclusions from them so as to provide the basis of an official action.

58. Article 165(6) of the Constitution provides that the High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or a quasi-judicial function but not a superior court. The applicant did not did not invoke the supervisory jurisdiction of the High Court conferred under the above provision. He invoked judicial review jurisdiction under section 8 of the Law Reform Act[41] and Order 53 Rule 3 of the Civil Procedure Rules and the inherent powers of this court.

59. There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control the power is conferred on superior courts to issue the necessary and appropriate writs.[42]

60. This power of superintendence conferred by Article 165 (6) of the Constitution, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee*,[43] is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the Constitution to interfere.[44]

61. The reasons cited by the applicant include absence of jurisdiction, illegality and procedural impropriety which are ground for judicial review. Whatever the purpose of Judicial Review is deemed to be, some propositions have become clear: orthodox principles of administrative law prescribe that courts engaged in review should not reconsider the merits of the decision because they are not the recipients of the discretionary power.[45] Judicial review is not an appellate procedure in which a judge reverses the substantive decision of an administrative body because of the sole ground that the merits are in the applicant's favour. Rather, it is a supervisory procedure whereby a judge rules only upon the lawfulness of a decision, or the manner in which one was reached. The question for review, therefore, is whether the decision was 'lawful or unlawful;' the question for appeal by contrast is whether the decision was 'right or wrong.' Craig has sought to justify this distinction between review and appeal by reference to the source of judicial powers: powers of review derive from the courts' inherent jurisdiction, whereas appeals do not – they are statutory.[46]

62. There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in Judicial Review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

63. Judicial Review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

64. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[47]:-

> "Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant..."

65. Flowing from the above principles, it is my finding that the argument that the applicant ought to have appealed or reviewed the impugned decision collapses.

66. The third argument propounded by the second Interested Party's counsel is that the issues raised in this case are *res judicata*. The basis for this argument is that leave to commence the private prosecution was granted in HCC No. 651 of 2016. This argument is legally flawed. The second Interested Party seems to misconstrue or deliberately misapply the leave granted in the said case. It should be recalled that the second Interested Party was granted leave in the said case to commence judicial review proceedings against the applicant and the third Interested Party. The leave granted in the said case to commence the said suit cannot apply to the proceedings under challenge.

67. Additionally, the second Interested Party propounded the argument that the judgment in HCC No. 651 of 2016 rendered on 12th July 2017 granted them leave to commence the private prosecution. Such an argument is a clear misreading of the said judgment. The learned Magistrate simply directed the applicant to commence the proceedings *de novo*. The judgment cannot be read in abstract as explained shortly. Relevant to the issue under consideration is my finding that the doctrine of *res judicata* does not and cannot apply to bar the instant case on account of the said decision as discussed below.

68. As **Somervell L.J**. stated [48] *res judicata* covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

> The requirements for *res judicata* are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

69. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued

judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. *Res Judicata* can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.[49]

70. The doctrine of *res judicata* is provided for in Section 7 of the Civil Procedure Act[50] and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.[51] Guided by the above tests, I find and hold that the plea for *res judicata* fails.

71. I now consider the second Interested Party's argument that the DPP acted in a partisan matter hence, the justification for the institution of the private prosecution.

72. A special feature of the Constitution of Kenya, 2010 is the establishment of an independent office of the DPP whose independence is provided under Article **157 (10)** of the Constitution which declares that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his powers or functions, shall not be under the direction or control of any person or authority. This provision is replicated in Section **6** of the Office of the Director of Public Prosecutions Act[52]which provides that pursuant to Article **157 (10)** of the Constitution, the Director of Public Prosecutions shall- ***(a)*** *not require the consent of any person or authority for the commencement of criminal proceedings;* ***(b)*** *not be under the direction or control of any person or authority in the exercise of his powers or functions under constitution, this Act or any other written law; and* ***(c)*** *be subject only to the Constitution and the law.*

73. The architecture and design of the above provision leaves no doubt that the DPP is not only required to act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. More fundamental is the fact that the decision to institute or not institute criminal proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. Differently stated, the prosecutor is required to act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the accused, victims, and witnesses. The reverse is that where the DPP's does not act independently, the decision cannot be allowed to stand.

74. The DPP must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community. The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, the DPP should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner.

75. The prosecutor has a discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process, for example— the decision whether or not to institute criminal proceedings against an accused person; the decision whether or not to withdraw charges or stop the prosecution; the decision whether or not to oppose an application for bail or release by an accused person who is in custody following arrest; the decision about which crimes to charge an accused person; the decision whether or not to enter into a plea or sentence agreement; the decision about which evidence to present during the trial; the decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail, or to seek review of proceedings.[53]

76. The DPP must serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law. A clear reading of the architecture of Article **157** of the Constitution leaves no doubt that the DPP is required to not only act independently, but to remain fiercely so. The second Interested Party cannot be seen to be the one pushing the DPP to mount a prosecution without offending Article 157 (10) of the Constitution. All that a complainant is required to do is to present his evidence to the investigating officers, and leave it to the DPP to independently evaluate the evidence and make a decision whether or not to mount the prosecution.

77. The second Interested Party suggests that he has submitted ample evidence and that the DPP has refused to act. It is not for the second Interested Party or even this court to decide the sufficiency or otherwise of the evidence before the prosecution is mounted. It is for the DPP to decide independently and act accordingly. This is a constitutional imperative. It is consistent with the constitutional dictates safeguarding the independence of the DPP and fair trial process. It is also important to mention that under Article **245 (4) (a)** of the Constitution, "no person may give a direction to the Inspector General with respect to the investigation of any offence or offences." Just like the constitutionally guaranteed independence of the DPP, this provision is aimed at ensuring that investigations are undertaken independently.

78. The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. The DPP must consider whether to— request the police to investigate the case further; or, whether to institute a prosecution; or, whether to decline to prosecute; or terminate a criminal trial like in the present case.

79. The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused persons and their families. A wrong decision may also undermine the community's confidence in the prosecution system and the criminal justice system as a whole. The prosecutor should remain fiercely independent, fair and courageous. The responsibilities entrusted to the DPP and police demand nothing less. D.A. Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor when he said:-

> "It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their

approach, always guided by fairness and common sense."***[54]***

80. The Constitutional provision in Article **157 (10)** of the Constitution 2010 ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. In the words of John Kelly TD, the prosecution system *"should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so."* ***[55]***The following observations are useful to bear in mind:-

> "...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice–impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one."***[56]***

81. Also, one key consideration to guide the DPP in instituting court proceedings is to advance or protect public interest as opposed to private interest. The decision to prosecute or not to prosecute is of great importance. It can have the most far-reaching consequences for an individual. Even where an accused person is acquitted, the consequences resulting from a prosecution can include loss of reputation, disruption of personal relations, loss of employment and financial expense, in addition to the anxiety and trauma caused by being charged with a criminal offence.

82. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system. For victims and their families, a decision not to prosecute can be distressing. The victim, having made what is often a very difficult and occasionally traumatic decision to report a crime, may feel rejected and disbelieved. It is therefore essential that the prosecution decision receives careful consideration.

83. The discretion vested upon the DPP by the law must be properly exercised. But the *grounds on which the exercise of such a discretion can be questioned are narrowly circumscribed*. Exercise of the discretion will be clearly unlawful *if the DPP knowingly invokes the power to arrest and prosecute for a purpose not contemplated by the law*. The decision to prosecute must be *based on the intention to bring the arrested person to justice*. The decision to terminate pending proceedings must be undertaken in order to advance the administration of justice.

84. The constitutional approach to the nature of a discretion and how it should be exercised must of necessity take cognizance of the provisions of the fundamental right to the freedom and the dignity of the individual.[57] This includes the rights of the accused and the complainant. A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for ulterior motives or improper purpose.[58] Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable.

85. In the institution of criminal proceedings, the DPP will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence.[59] Throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence.[60]

86. It has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. There must be sufficient evidence to mount a prosecution. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution. It is for the DPP to determine that the evidence presented is sufficient to justify a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused.

87. It is also true that the decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence.

88. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the accused and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.

89. Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution. In deciding whether or not to institute criminal proceedings against an accused person, prosecutors must assess whether there is sufficient and admissible evidence to provide **a reasonable prospect of a successful prosecution**.[61]There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued. This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. The review of a case is a continuing process.[62] Prosecutors must take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute or not to prosecute has been made.[63] This may occur after having heard and considered the version of the accused person and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused person has pleaded or in the course of the trial in spite of an initial decision to institute a prosecution.[64]

90. When evaluating the evidence regard should be had to the following matters:- **(a)** Are there grounds for believing the evidence may be

excluded bearing in mind the principles of admissibility at common law and under statute?**(b)** *If the case depends in part on admissions by the accused, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?**(c)*** Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?**(d)** Does a witness have a motive for telling less than the whole truth? **(e)**Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute. ***(f).*** *whether the alleged offence is of considerable public concern and **(g)** the necessity to maintain public confidence.* As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution.

91. I am conscious that before me is a judicial review application and not an appeal against the Magistrates ruling. However, the considerations discussed above are useful in determining cases where the DPP is accused of being partisan as has in this case. I must add the allegations of the DPP being partisan are thin and totally unsupported by evidence.

92. I now address the question whether or not the trial Magistrate erred in entertaining the application despite the existence of the court order rendered in HCC No. 430 of 2016. The relevant part of the order reads- *there should be no filing of any other suit or application except with leave of the court.*

93. The construction by the second Interested Party is that the above order only applies to civil cases and not criminal cases. The applicant, the first and third Interested Parties are of a different opinion. They maintain that the order encompassed all cases, including the instant application.

94. Despite the diametrically opposed interpretation of the same judgment, none of the parties referred to the principles governing interpretation of court judgments. None of the parties backed their positions with authorities. I find it useful to refer to the Southern African case of *Firestone South Africa (Pty) Ltd v Genticuro AG**[65]*** in which the court made some general observations about the rules for interpreting a court's judgment or a court order. It stated:-

> "…the basic principles applicable to the construction of documents also apply to the construction of a Court's judgment or order: the Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting the judgment or order may be investigated and regarded in order to clarify it….

It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

95. Guided by the wisdom in the above jurisprudence, I find no ambiguity in the words used in the order in question. I will therefore examine the language and the context within which the judgment was rendered. The often-quoted dissenting judgment of Schreiner JA, eloquently articulates the importance of context in statutory interpretation:-

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."[66]

96. The Supreme Court of Appeal of South Africa in *Natal Joint Municipal Pension Funds v Endumeni Municipality**[67]*** acknowledged the interpretation that gives regard to the manifest purpose and contextual approach as the proper and modern approach to statutory interpretation. Wallis JA pointed out that "in resolving a problem, where the language of a statute leads to ambiguity the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation."[68]

97. In the United Kingdom, the Chancery Division of the High Court, per Lord Greene MR in *In re Birdie v General Accident Fire and Life Assurance Corporation Ltd*,[69] stated the following on the contextual approach to statutory construction:-

> "The real question to be decided is, what does the word mean in the context in which we here find it, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy."

98. A contextual reading must of course remain faithful to the actual wording of the judgment. A contextual interpretation therefore must be sufficiently clear to accord with the rule of law[70]and the intention of the court in the context of the dispute in which the order was issued. The background of the dispute in which the order was issued is that the parties were engaged in multiple interrelated suits. As stated earlier, a total of 14 cases had been filed. Viewed in this context, the intention of the court was clear. That no further proceedings were to be filed without the leave of the court in the said case. The operative words in the relevant part of the order is *there should be no filing of any other suit or application except with leave of the court.*

99. A purposive and contextual construction of the above phrase leaves me with no doubt that "any other suit or application" is broad enough to include the institution of a private prosecution based on the issues the subject of the disputes in the multiple suits filed in court involving

the same parties. It is important to mention that the substance of the private prosecution is premised on disputes in the other cases pending in court. At the center of all the disputes is directorship of the said companies. Simply put, what is sugar coated as a private criminal prosecution is a civil dispute in disguise. On this ground alone this application succeeds because private prosecution offends the clear terms of the court order issued in HCCC No. 430 of 2012.

100. Closely related to the issue under consideration is the fact that the private criminal prosecution can no matter the outcome serve to advance or assisting one party in the civil disputes. It follows that the private criminal prosecution is actuated by ulterior motive, hence, it amounts to abuse of court process.

101. The existence of a court order barring parties from instituting other suits raises a pertinent question, which is whether the impugned prosecution has a legal or factual foundation. The core issue here is for this court to determine the circumstances under which the High Court in exercise of its vast jurisdiction can halt, stop, prohibit or quash a criminal prosecution. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power *to 'stay'* an *indictment* (or stop a prosecution) if the court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the court or infringement of a citizens' fundamental rights. Abuse of process has been defined as something so unfair and wrong with the prosecution that the court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case.[71]Whether a prosecution is an abuse of court process, unfair, wrong or a breach of fundamental rights, it is for the court to determine on the individual facts of each case.

102. So long as the said order stands, the private prosecution cannot be sustained. The enquiry is whether there has been an irregularity or an illegality that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted. [72]

103. A criminal trial commenced in violation of a court order is an illegality. The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, mandamus or permanent stay of proceedings are a device to advance the rule of law. In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceedings ought to be quashed.

104. The saving High Court's inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice. The leading case on the application of abuse of process remains *Bennet vs Horseferry Magistrates Court & another*.[73]The court confirmed that an abuse of process justifying the stay of a prosecution could arise in the following circumstances:-

i. Where it would be impossible to give the accused a fair trial; or;

ii. Where it would amount to a misuse/manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the particular case.

105. Chris Corns[74]argues that the grounds upon which a stay will be granted have been variously expressed in the cases. These grounds can be classified under three categories:-

i. When the continuation of the proceedings would constitute an 'abuse of process,'

ii. When any resultant trial would be 'unfair' to the accused, and

iii. When the continuation of the proceedings would tend to undermine the integrity of the criminal justice system.

106. A prosecution commenced in violation of a court order will no doubt undermine the integrity of the criminal justice system. Criminal proceedings commenced to advance other gains other than promotion of public good are vexatious and ought not to be allowed to stand. The word *"vexatious"* means *"harassment by the process of law,'' "lacking justification"* or with *"intention to harass."* It signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law (or at least no discernible basis); and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court.

107. Lastly, the second Interested Party argued that he was not a party in HCC No. 430 of 2012, hence, the said order does not bind him. Such an argument is legally frail and collapses on several fronts. *First,* the dispute in all the cases is the same dispute presented in the complaint in the private prosecution. *Second,* at the centre of the dispute is the directorship of the said companies. *Third,* the said company was a party in the case in which the order was issued. *Fourth,* the second Interested Party is a director in the said company and so intertwined are the disputes between the directors, the shareholders and the companies that they cannot be separated. *Fifth*, it is the same company that the applicant is accused of having falsified its documents. The said order affects the second Interested Party in person and also as a director of the companies because companies act through their directors.

108. It is my finding that the applicant has presented sufficient material to demonstrate that there is basis to justify the orders sought. In view of my above reasoning, the conclusion becomes irresistible that the applicant's Notice of Motion dated **13th** March 2017 is merited. Accordingly, I allow the applicant's Notice of Motion dated **13th** March 2017 and issue, an order of *certiorari* quashing Nairobi **Chief Magistrates Private Prosecution Case number 2 of 2017**, *Republic through Mohan Galot v Pravin Galot, Rajesh Galot and Director of*

Public Prosecutions (Interested Party).

109. I also issue an order of *Prohibition*, prohibiting the said *Mohan Galot* either by himself or acting through the Director of Public Prosecutions or any other person acting on his behalf from further prosecuting the applicant in Private Prosecution Case Number 2 of 2017 or charging the said *Pravin Galot and Rajesh Galot* in any court in the Republic of Kenya with any offence premised on the same facts as in the impugned private prosecution case.

110. I make no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 11th day of March 2020.

John M. Mativo

Judge

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[1] Judicial Review Misc. Civ. Application No. 640 OF 2008.

[2] Article 157 (6) of the Constitution.

[3] Act No. 4 of 2015.

[4] Cap 75, Laws of Kenya.

[5] {2015} e KLR.

[6] {2013} e KLR.

[7] {1964}EA 414.

[8] Civil Appeal No. 238 of 2003.

[9] {1985} KLR 91.

[10] Civil Appeal No. 185 of 2001.

[11]{2008} e KLR.

[12] Citing Petition 227 and 230 of 2009.

[13] Act No. 2 of 2012.

[14] NBI Misc App No. 249 of 2012.

[15] Citing *Cape Holdings Ltd v Attorney General and another* {2012} e KLR.

[16] High Court Civil application number 406 of 2001.

[17] {2006} e KLR.

[18] Civil Application No. 114 of 1997.

[19] Civil Appeal Number 266 of 1996.

[20] Citing *Republic v Chief Magistrates Court, Mombasa ex parte Ganijee & another* {2002} 2 KLR 703.

[21] Cap 75, Laws of Kenya.

[22] Act No. 26 of 2015.

[23] Cap 75, Laws of Kenya.

[24] {2018} e KLR.

[25] {2017} e KLR.

[26] {2014} e KLR.

[27] {2002} 2 KLR.

[28] Cap 75, Laws of Kenya.

[29] {2008} e KLR.

[30] {2014} e KLR.

[31] Civil Appeal No. 185 of 2001.

[32] {2008} 2 EA 300.

[33] Act No. 4 of 2015.

[34] *2000 (2) SA 674 (CC) at 33.*

[35] Act No. 4 of 2015.

[36] Act No. 4 of 2015

[37] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[38] Act No. 4 of 2015.

[39] Ibid.

[40] Cap 26, Laws of Kenya.

[41] Cap 26, Laws of Kenya.

[42] *Gallagher v. Gallagher*, 212 So. 2d 281, 283 (La. Ct. App. 1968).

[43] AIR 1951 Cal. 193.

[44] *See D. N. Banerji v. P. R. Mukherjee 1953 SC 58.*

[45] S. De Smith, H. Woolf and J. Jowell, *Principles of Judicial Review* (Sweet and Maxwell, 1999) at 20.

[46] P. Craig, *Administrative Law*, 5th ed (Sweet and Maxwell, 2003) at p. 9.

[47] {2014} eKLR.

[48] In *Greenhalgh vs Mallard* (1) (1947) 2 All ER 257.

[49]http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html -Accessed on 16 December 2017.

[50] Cap 21, Laws of Kenya.

[51] See ***Lotta vs. Tanaki* {2003} 2 EA 556.**

[52] Act No. 2 of 2013.

[53] Prosecution Policy, (Revised June 2013), available at https://www.npa.gov.za/sites/default/files/Library/Prosecution Policy.

[54] Infra.

[55] http://www.paclii.org/fj/other/prosecutors-handbook.pdf.

[56]Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007. (Now the Hon. Anna Katzmann, Judge of the Federal Court of Australia).

[57] Article 19 (2)

[58]*Republic vs Attorney General ex-parte Arap Ngeny* HCC APP NO. 406 of 2001

[59] *Van der Westhuizen v S* (266/10) [2011] ZASCA 36; 2011 (2) SACR 26 (SCA) (28 March 2011).

[60] Ibid.

[61] Prosecution Policy, (Revised June 2013), available at https://www.npa.gov.za/sites/default/files/Library/Prosecution Policy.

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] 1977 (4) SA 298 (A) Trollip JA

[66] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3.

[67] 2012 4 SA 593 (SCA).

[68] Ibid, at (610B–C).

[69]1949 Ch D 121 130.

[70] *Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others* {2000} ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

[71] *Hui Chi-Ming vs R* {1992} 1 A.C. 34, PC.

[72] Interpreting similar provisions in the constitution of South Africa, the South African Constitutional court (Nicholas AJA), Shabalala & 5 others vs A.G of Transvaal & Another CCT/23/94.

[73] {1993}All E.R 138, 151, House of Lords.

[74]Chris Corns, *Judicial Termination of Defective Criminal Prosecutions: Stay Applications,* 76 University of Tasmania Law Review, Vol 16 No. 1, 1977.